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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO. : 10/651,583
IN RE APPLICANT : TOPP, Daniel P.
TITLE : APPARATUS FOR ERADICATING PESTS
FILING DATE : August 29, 2003
EXAMINER : David J. Parsley
ART UNIT : 3643
CUSTOMER NO. : 021616

To: Mail Stop APPEAL BRIEF – PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL LETTER ACCOMPANYING APPEAL BRIEF TO THE BOARD OF PATENT APPEALS AND INTERFERENCES

Dear Sir:

Transmitted herewith is an Appellant's Brief Pursuant to 37 C.F.R. §1.192 (23 pgs.) that is responsive to the outstanding Advisory Action dated June 21, 2006, and the final Office Action dated March 7, 2006, in the above-captioned application.

- [XX] Small entity status of this application pursuant to 37 C.F.R. §1.27 has been established.
- [] It is believed that no extension of term is required. However, this conditional petition is being made to provide for the possibility that Applicant has inadvertently overlooked the need for a Petition for Extension of Time under 37 C.F.R. §1.136(a).
- [] Applicant petitions for an Extension of Time under 37 C.F.R. §1.136 (fees: 37 C.F.R. §1.17(a) - (d) for the total number of months checked below:

<u>Extension Months(s)</u>	<u>Fee For Other Than Small Entity</u>	<u>Fee For Small Entity</u>
[] 1 Month	\$120.00	\$ 60.00
[] 2 Months	\$450.00	\$225.00
[] 3 Months	\$1,020.00	\$510.00
[] 4 Months	\$1,590.00	\$795.00
[] 5 Months	\$2,160.00	\$1,080.00

- [] A Terminal Disclaimer Pursuant to 37 C.F.R. § 1.321(b) and (c) is enclosed.
- [] An Assignment (pgs.) is enclosed.
- [] Assignment Cover Sheet (1 pg.)
- [] Fee Transmittal for FY2006 – Form PTO/SB/17 (1 pg.) is enclosed.
- [XX] A postage-prepaid, self-addressed postcard for the PTO to acknowledge receipt of this communication is enclosed.
- [XX] Other:
- [XX] Appellant's Appendix A to Appeal Brief – Listing of Claims (7 pgs.);
- [XX] Appellant's Appendix B to Appeal Brief – Copy of Declaration Under 37 CFR §1.132 of Jeffrey S. Helmes (5 pgs.);
- [] Figure __ with amendments marked in red ink. (pg.) is enclosed.
- [XX] No additional claim fee is required.

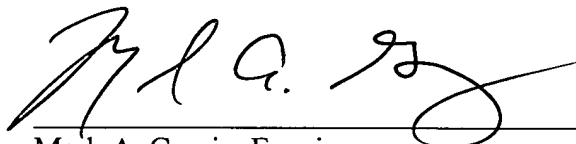
[XX] Payment is made by:

- Please charge my Deposit Account No. _____ in the amount of \$ _____. Two copies of this transmittal are attached.
- Check No. ____ in the amount of \$ _____.00 to cover the extension fee is enclosed.
- [XX] Credit Card Payment Form PTO-2038 authorizing a charge in the amount of \$250.00 (fee for filing a Brief in support of an Appeal) is enclosed to cover the fee(s) due.

Respectfully submitted,

11 SEPT 2006

Date



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* * * * *

CERTIFICATE OF MAILING

I hereby certify that this communication, along with any paper or fee indicated as being enclosed, are being deposited with the United States Postal Service as first-class mail, postage prepaid, in an envelope addressed to: Mail Stop APPEAL BRIEF – PATENTS, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on the date indicated below.

September 11, 2006

Date


Mark A. Garzia

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APPELLANT'S BRIEF PURSUANT TO 37 C.F.R. §1.192

Dear Sir:

Appellant appeals the rejections set forth in the Final Office Action dated March 7, 2006.

A Notice of Appeal was filed along with the appropriate fee on July 10, 2006. Appellant's Brief is due on September 11, 2006 (September 10, 2006, being a Sunday.)

A Credit Card Payment Form is enclosed to cover the \$250 fee (small entity) associated with the filing of an Appeal Brief.

I. Real Party in Interest

The real party in interest is Topp Construction Services, Inc., which is the assignee of record. (The assignment of this invention from the inventor to Topp Construction Services, Inc. was recorded at the PTO during the prosecution of priority U.S. Appln. No. 10/145,184 now U.S. Patent No. 6,612,067.)

II. Related Appeals and Interferences

There are no prior or other appeals, judicial proceedings, or interferences known to the Appellant regarding this application.

III. Status of Claims

Claims 32-52 are pending in this application and all are subject to final rejection. All other claims have been cancelled. The pending claims are set forth in the Appendix A which is attached to this brief.

IV. Status of Amendments

A Preliminary Amendment accompanied the initial filing of this application; the Preliminary Amendment cancelled claims 1-31 and added claims 32-51. A Reply and Amendment was filed on August 5, 2004, that amended certain claims and added claim 52. A Reply and Amendment to Final Office Action (including a Declaration Under 37 C.F.R. § 1.132 by Jeffrey S. Helmes) was filed on January 18, 2005, but was not entered initially by the

Examiner.

Appellant filed an Request for Continuing Examination (RCE) on February 14, 2005, submitting the Reply and Amendment that was submitted after the Final Office Action as a submission required under 37 C.F.R. § 1.114. In response to the First Office Action after the filing of the RCE application, Appellant filed a Reply Pursuant to 37 C.F.R. §1.111 on October 20, 2005.

After the Examiner issued a Final Office Action, Appellant filed a Reply to Final Office Action (under 37 C.F.R. § 1.116) on June 14, 2006, which cancelled claim 50, amended claims 32, 34-36, 39, 40, 43, 44, 48, 49 and 51, and added claim 53. The Examiner issued an Advisory Action dated June 21, 2006, indicating that the Reply to Final Office Action would not be entered. Accordingly, the claims presented in the Reply Pursuant to 37 C.F.R. § 1.111 dated October 14, 2005, are the currently pending claims.

V. Summary of Claimed Subject Matter

There are currently three independent claims pending in this application, 32, 44 and 49. Appellant's claim 32 describes an apparatus for eradicating pests through the use of heated air. Applicant's apparatus comprises a chamber 12 having a ceiling and a floor, a door that allows ingress to and egress from the interior of the chamber, a means for heating air 52 in the interior of the chamber to a temperature lethal to pests, at least one plenum for delivering air heated by the heating means to the interior volume of the chamber, a means for circulating the air in the interior of the chamber for improving the distribution of the heated air in order to heat the interior of the chamber more evenly, and a means for returning the air from the interior of the

chamber to the heating means in order to heat-treat any products placed within the chamber to a temperature that is lethal to pests..

As set forth on page 10, lines 2-3 of Appellant's specification, "A heating means 52 is the device to heat the air inside the chamber and provide the necessary heat to treat the wood products stored within the chamber."

In one embodiment, the Appellant discloses a ceiling/subceiling assembly (referred to as a ceiling air plenum) to deliver the heated air to the interior of the chamber, and in the same embodiment, the Appellant discloses a floor/subfloor assembly (referred to as a floor air plenum) to return the air to the heating means. As set forth at page 5, lines 12-15 of Appellant's specification, "The interior ceiling and the interior sub-ceiling, and the floor/subfloor are uniquely designed to control the flow of air within the chamber. The means for re-circulating the heated air within said interior of said chamber communicates with the heating means. The floor air plenum runs the entire length of the interior floor, and consists of perforated floor sections that form the primary floor."

Appellant's claim 44 similarly claims an apparatus for eradicating pests using warm air. However, Appellant does not specifically claim both a supply plenum and a return plenum.

Appellant's claim 49 also claims an apparatus for eradicating pests using heated air. However, claim 49 recites only a ceiling plenum for returning air to the heating means from the chamber.

Appellant's claim 52 depends from claim 49 and expressly recites a floor plenum.

VI. Grounds of Rejection to be Reviewed on Appeal

There are three issues presented for review in this appeal. Specifically these issues are:

- A) Whether claims 32-34, 26-40, 42-44, 49, 51, and 52 are unpatentable under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,716,676 to Imagawa;
- B) If claims 32-34, 26-40, 42-44, 49, 51, and 52 are not anticipated by Imagawa, whether they are unpatentable as being obvious in view of Imagawa; and
- C) Whether any of Appellant's claims were properly rejected under 35 U.S.C. § 103(a) over Imagawa in view of U.S. Patent No. 6,141,901 to Johnson et al; or over Imagawa and further in view of U.S. Patent No. 5,965,185 to Bianco or U.S. Patent No. 6,227,002 to Bianco et al; or over Imagawa in view of U.S. Patent No. 3,814,315 to Dmysh.

VII. Argument**A. Imagawa cannot anticipate Appellant's invention**

A rejection under 35 U.S.C. §102(b) requires that each and every element of the claimed invention be taught by the cited reference. Since a patent must describe and enable an invention to one skilled in the art, an anticipatory patent by definition must place the claimed invention into the public domain.

Imagawa discloses a system for destroying insects using steam. Every embodiment of Imagawa's insect killing system disclosed in U.S. Pat. No. 4,716,676 utilizes a "steam generator 12."

In contrast to Imagawa, Appellant's independent claims 32 and 44 recite the limitation "a means for heating air" while independent claim 49 recites the limitation "a heater having the

capacity to heat the air.” It should be noted that claim 44 also includes in its preamble “An apparatus for eradicating pests that utilizes warm air...” (See pgs. 3, 6 and 7 of Reply Pursuant to 37 C.F.R. § 1.111 dated October 14, 2005.)

“A *warm-air heating system* is one in which the air is heated in a furnace and circulated through the rest of the structure either by gravity or motor-driven centrifugal fans. If the former is the case, then the system is commonly referred to as a *gravity warm-air heating system*. Any system in which air circulation depends *primarily* on mechanical means for its motive force is called a *forced warm-air heating system*.” (See p. 125, Chapter 6, Warm-Air Heating Systems, *Audel™ HVAC Fundamentals Volume I – Heating Systems, Furnaces, and Boilers*, 4th Edition, James E. Brumbaugh, ©2004 by Wiley Publishing, Inc., Indianapolis, IN, emphasis in the original).

Audel continues by stating:

The American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) defines a furnace as a complete heating unit for transferring heat from fuel being burned to the air supplied to a heating system.” The *Standard Handbook for Mechanical Engineers* (Baumeister and Marks, seventh edition) provides a definition that differs only slightly from the one offered by ASHRAE: “a self-enclosed, fuel-burning unit for heating air by transfer of combustion through metal directly to the air.”

Contained within these closely similar definitions are the two basic operating principles of a furnace: (1) Some sort of fuel is used to

produce combustion, and (2) the heat resulting from this combustion is transferred to the air within the structure. Note that *air* – not steam, water, or some other fluid – is used as the heat conveying medium. This feature distinguishes warm-air heating systems from the other types; see Chapter 6, “Warm-Air Heating Systems.”

(Page 273, *Audel™ HVAC Fundamentals Volume I – Heating Systems, Furnaces, and Boilers*, 4th Edition, James E. Brumbaugh, ©2004 by Wiley Publishing, Inc., Indianapolis, IN.)

Applicant submits that one skilled in the art, after reading Applicant’s specification (including Figures 2B, 5A, 5B, 10A and 10B), would immediately discern that Applicant is utilizing a “warm-air heater” or “furnace” as defined by either ASHRAE or the *Standard Handbook for Mechanical Engineers*. Applicant’s heating means heats the air directly as is understood by those in the industry, and when interpreting the common HVAC terms hot-air heater, direct-fired heater and furnace. Applicant’s system does not heat water or any other liquid, nor does it produce steam as is disclosed in Imagawa.

One skilled in the art would readily recognize the differences between an apparatus that requires a steam generator to produce steam and an apparatus that uses a heater to produce hot air.

An important advantage of Applicant’s invention is that by directly heating air and moving that air into the chamber, the products being treated with heat are not saturated in water at the conclusion of the heat-treatment. Imagawa floods its chamber with steam, thereby ensuring that all objects within the chamber will be coated with water when the interior of the

chamber returns to “room temperature.”

Heating systems are generally classified by the substance that carries the heat from its point of origin to the area being heated. There are basically four mediums for conveying heat. These four mediums are:

1. Air
2. Water
3. Steam
4. Electricity

Audel™ HVAC Fundamentals Volume I – Heating Systems, Furnaces, and Boilers, 4th Edition, James E. Brumbaugh, ©2004 by Wiley Publishing, Inc., Indianapolis, IN, pgs. 2-3.

Audel series is an introductory series of texts to HVAC systems and is suitable for high-school level vocational education students studying HVAC systems. Accordingly, a person of ordinary skill in the art of Appellant’s invention would be very familiar with the principles set forth in *Audel*.

Audel repeatedly identifies, points out and explains the differences between a heating system that heats air directly and one that uses a boiler to heat water until it produces steam. One skilled in the art would be intimately familiar with the subject matter explained in *Audel*, and would readily know the differences between a “hot air” heating system and a “steam” heating system.

Audel™ defines the four heat-conveying mediums, including the two mediums relevant to the subject matter at hand.

Air

Air is a gas consisting of a mechanical mixture of 23.2% oxygen (by weight), 75.5% nitrogen, 1.3% argon with small amounts of other gases. It functions as the heat-conveying medium for warm-air heating systems... (*Audel*, pg. 16.)

Steam

Those who design, install, or have charge of steam heating plants certainly should have some knowledge of steam and its formation and behavior under various conditions.

Steam is a colorless, expansive, and invisible gas resulting from the vaporization of water. The white cloud associated with steam is a fog of minute liquid particles formed by condensation. This white cloud is caused by the exposure of the steam to a temperature lower than that corresponding to its pressure. ...

The various changes that take place in the making of steam are known as vaporization...

Another important factor to consider when dealing with steam is the boiling point of liquids. ...

One's knowledge of the fundamentals of steam heating should also include an understanding of the role that condensation plays. By definition, *condensation* is the change of a substance

from the gaseous to the liquid (or condensate) form. ...

The condensation of steam can cause certain problems for steam heating systems unless they are designed to allow for it...

(*Audel*, pgs. 18-21.)

“Steam is a very effective heating medium. Until recently, this property of steam has resulted in its being the most commonly used method of heating residential, commercial, and industrial buildings. Over the last 40 years or so, steam heating has been largely replaced in residences and small buildings by other heating systems that have often proven to be less expensive to install and operate or that operate at similar or greater levels of efficiency in small structures.” *Audel*, pg. 185.

One skilled in the art would be familiar with the formation of steam and its behavior at specific temperatures and pressures. The basic operating principles of steam heating are relatively simple. “A boiler is used to heat water until it turns to steam. When the steam releases its heat, it condenses and returns to the boiler in the form of water for reheating.” (See *Audel* at pg. 185.)

(It should be noted that the application that issued into U.S. Patent No. 4,716,676 (Imagawa) is a continuation-in-part from U.S. Serial No. 647,030 filed September 4, 1984, which in turn claims priority to Japanese Application No. 58-17102. It is somewhat unfortunate that the Imagawa patent was not originally written in English. Appellant believes that the term “steam generator” may be a literal translation from Japanese, and, although technically accurate, as indicated in *Audel*, in the United States, an apparatus that heats water for producing steam is

commonly referred to as a “boiler.”)

Appellant’s claimed invention recites “a means for heating,” as expressed in *Audel* and after a reading of Appellant’s specification, it would be clear to one skilled in the art that Appellant is referring to a “furnace” or similar direct-fired heater and not a steam-generator or boiler. (See *inter alia* pgs. 9-10, and Figures 5A, 5B, 10A & 10B from Appellant’s specification). In fact, Figures 10A and 10B, show a schematic representation of a forced-air heater.

Imagawa discloses a “steam generator” that heats water to its boiling point to produce steam. A “steam generator” does not heat air as disclosed or claimed by Appellant or as commonly understood by a person of average skill in the HVAC industry. As such, Imagawa does not teach “each and every element” of the claimed invention. Therefore, Imagawa cannot anticipate Applicant’s independent claims 32, 44 and 49 or any claim that depends from them.

In addition, Appellant’s independent claims 32, 44 and 49 all recite the limitation of a plenum for distributing the heated air within the chamber. Imagawa does not disclose a plenum. Imagawa, being a system utilizing steam, does not have a use for a plenum.

In addition to a “steam generator”, Imagawa discloses a circulation chamber (A) that directs steam through a series of vertical self-contained units that enclose harvest boxes filled with fruit. The self-contained units are called “insect killing cells” (B). The circulation chamber utilizes a plurality of blowers 10 that move the steam in a horizontal direction. Each insect killing cell is a separate unit which includes a hood having a differential blower mounted on the hood to draw steam from the floor, through the fruit boxes and out the top of the hood (i.e., moves steam in a vertical direction). A heating device 13 and a cooling device 14 communicate

with the circulation chamber (A) via a pair of discharge ports 15.

The Examiner has repeatedly stated in several Office Actions that Imagawa discloses both a ceiling plenum and a floor plenum. The Examiner makes numerous references to Figures 2, 6 and 7 of Imagawa to support his position that Imagawa discloses a ceiling plenum. Unfortunately, Appellant is not sure what the Examiner is referring to since the Examiner refuses to use reference numerals.

Imagawa discloses a chamber (A) with a first end, a second end, a left wall, a right wall, a ceiling and a floor. However, there is no sub-ceiling shown or discussed in Imagawa. The Examiner states that Figure 2 shows a “sub-ceiling.” The only element to which the Appellant can discern that somewhat appears to be a sub-ceiling in Figure 2, is actually a beam 27 that is supported by its own support structure within chamber (A), and can be more clearly seen in Figures 1, 3 and 4. Beams 27, illustrated in Imagawa, are used in conjunction with a pulley or wench 26 to form a “winding means.” (See column 3, lines 20-25 of Imagawa.) The winding means is designed to “move vertically” hoods 21. The hoods 21 cap each “insect killing cell” (B) of Imagawa. Appellant respectfully submits that the beams 27 do not form a sub-ceiling and Imagawa does not disclose a plenum.

Appellant has requested several times for the Examiner to use reference numerals to identify the alleged sub-ceiling and plenum illustrated in Imagawa, but the Examiner has repeatedly failed to do so. Accordingly, Appellant has made an “educated guess” to ascertain the structure that the Examiner states is a plenum.

To further support its position, Appellant submitted a Declaration of Jeffrey S. Helmes under 37 CFR § 1.132 (hereinafter the “Declaration”) which accompanied the first Reply and

Amendment to Final Office Action dated January 13, 2005, and was re-submitted with the Request for Continuing Examination on February 14, 2005, as a submission required under 37 C.F.R. §1.114. Appellant has attached Mr. Helmes' Declaration herewith and has labeled it Appendix B.

Mr. Helmes has a Bachelors of Science Degree in Mechanical Engineering from Drexel University and had over twelve years experience (plus eight years concurrently working part-time with the Appellant) as a Mechanical Engineer at the time the Declaration was signed. He is currently employed as a Senior Project Engineer at Maguire Products, Inc. in Aston, Pennsylvania.

As stated in his Declaration, Mr. Helmes was unable to discern what the Examiner identifies as a sub-ceiling forming a plenum in Imagawa. (See the Declaration at paragraph E) Mr. Helmes continues by stating, a plenum cannot be used to carry steam, and Imagawa does not disclose either a ceiling plenum or a floor plenum as used in the HVAC industry.

Imagawa floods the entire interior volume of the chamber with steam and uses a plurality of pyramidally-shaped hoods that direct the steam over the fruit. This structural arrangement is dissimilar to any ventilation system known and cannot define a plenum as is commonly known in the HVAC industry. In a typical steam heating system, the heat is transferred to the structure through the use of radiators (steam does not actually come in contact with the items or volume which are supposed to be heated). An important drawback of flooding the interior chamber with steam is that the water vapor begins to immediately condense on items that are less than 212° F, and forms water. Metals will oxidize (e.g., iron will rust) when exposed to water, and porous items (paper, wood, etc.) will absorb the water and may eventually grow mold.

In Paragraph E of the Declaration, Mr. Helmes sets forth the general definition of a “plenum” as an enclosed portion of a ventilation system that delivers or receives air from a blower for distribution in a ventilation system. Mr. Helmes cited two industry sources to support his definition of a “plenum,” namely the *Uniform Mechanical Code 2000* and the *1998 International Mechanical Code*. (See the Declaration at Paragraph E.)

In fact, Mr. Helmes states that “there are few similarities in a system that delivers steam and one that delivers heated air.” (See Paragraph G of the Declaration.) Mr. Helmes concludes, “to the best of my knowledge, no HVAC plenums are designed to deliver steam.”

The Declaration was submitted to present objective evidence of patentability based on an analysis of the teachings of Imagawa. The Examiner dismissed the Declaration stating that the “Declaration was merely opinion.” (See Examiner’s Office Action dated April 14, 2005.) However, Mr. Helmes statements, including the aforementioned quote that there are few similarities between a hot air heating system and a steam heating system, are clearly supported by *Audel*. In addition, Mr. Helmes cited the *Uniform Mechanical Code 2000*, sections 601 and 602, and the *1998 International Mechanical Code*, sections 602 and 1304 for his definition of a “plenum.”

In paragraph 5 of the Office Action dated April 14, 2005, the Examiner states, “steam, like air is a gas and it is the Examiner’s position that the device of Imagawa discloses a plenum no matter what type of gas is placed inside the plenum.” The Examiner never provides a citation to support his “position.” Clearly, based on the definitions in *Audel*, “steam” is not the same as “air” in the HVAC industry. Steam is water vapor and by definition has a high humidity; heated air is a mechanical mixture of primarily nitrogen and oxygen, and usually has a relatively low

humidity. Further, steam is water that has its temperature raised to over 212° F whereas “warm air” heaters rarely heat air above about 170° F. Plenums are not designed to take the high humidity or the higher temperature associated with steam. Further, Appellant contends that the *Uniform Mechanical Code 2000* definition of a “plenum” implies that the medium that is channeled within the plenum is a breathable gas (i.e., air) and not steam.

Imagawa does not disclose either a ceiling plenum or a floor plenum as claimed by Appellant. Accordingly, Imagawa cannot anticipate Appellant’s invention as recited in claims 32, 44 and 49, or any claim that depends therefrom.

With respect to claim 33, Applicant claims a second plenum. As set forth in *Audel* and the earlier-filed Declaration signed by Jeff Helmes, a heating system that uses steam as a medium for delivering heat does not utilize a plenum. Not only does Imagawa fail to disclose one plenum, it fails to disclose two plenums.

Appellant submits that:

- A) Imagawa discloses the use of steam to kill pests. In contrast, Applicant’s independent claims 32, 44 and 49 include the limitation that the Appellant’s apparatus destroys pests through the use of heated air.
- B) Imagawa requires a boiler to produce steam. A boiler is designed to heat water to at least the boiling point of water (212° F) in order to produce steam. In contrast, Appellant utilizes a heater for heating air as claimed in claims 32, 44 and 49; Appellant does not claim a boiler. (Appellant’s heater does not need to produce heat at 212° F, nor is it designed to heat air to such a high temperature, and is not designed to boil water.)
- C) Imagawa floods its outer chamber with steam and then redirects the steam through

a plurality of hoods 21 and blowers 10, 11. In contrast, Appellant utilizes a plenum to control the introduction of the heated air into the chamber.

Imagawa clearly does not disclose the same physical structures as Appellant's claimed invention. A first structural difference is that Imagawa uses a "steam generator" whereas Appellant uses a furnace or similar heating means to heat air. A second structural difference is that Imagawa uses a plurality of horizontally-positioned hoods to flood a chamber with steam to kill insects, whereas Appellant uses a plenum to deliver and distribute heated air to kill pests. Therefore, Appellant respectfully submits that Imagawa does not disclose "each and every element" as required by 35 U.S.C. § 102 and respectfully requests that the rejection based on §102 be reversed.

B. Imagawa by itself cannot make obvious Appellant's claimed invention

A *prima facie* case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art. *In re Rinehart*, 531 F.2d 1048, 189 U.S.P.Q. 143, 147 (C.C.P.A.)

As discussed above in *Audel*, a typical heating system that relies on a "steam generator" to produce steam as the heat-conveying medium for heating an object or volume is dissimilar to a heating system that produces warm air and uses air as the heat-conveying medium for heating an object or volume.

Appellant submits that one skilled in the art, after reading Applicant's specification (including Figures 2B, 5A, 5B, 10A and 10B), would immediately discern that Applicant is utilizing a "forced-air heater" or "furnace" as defined by either ASHRAE or the *Standard*

Handbook for Mechanical Engineers. Applicant's heating means heats the air directly as is understood by those in the industry. Applicant's system does not heat water, steam or any other liquid as is disclosed in Imagawa and Applicant's claimed invention does not require a boiler or "steam generator."

Every embodiment disclosed in Imagawa requires a steam generator. Every embodiment claimed by Appellant cites a means for heating air. A steam-generator is structurally different than a heater that heats air, and Imagawa cannot suggest the subject matter claimed by Appellant. Therefore, one skilled in the art, after reading and using the teachings of Imagawa, would not be led to a warm-air based system as claimed by the Appellant.

A "plenum" is used to channel hot air in a ventilation system. Appellant submits that based on the *Uniform Mechanical Code 2000* definition, Imagawa does not disclose or suggest a plenum as is commonly defined in the art.

Further, Imagawa simply floods the interior chamber with steam and uses pyramidal-shaped hoods to generally direct the steam towards the fruit. The pyramidal-shaped hoods are not plenums and there is no disclosure or suggestion of a plenum in Imagawa. Imagawa states throughout the specification that his invention produces steam to kill insects. Imagawa does not disclose a ventilation system. Nowhere does Imagawa disclose or suggest that it utilizes hot air to kill pests/insects, and there are no plenums or "air-filled" spaces in Imagawa as is known to one skilled in the art. In fact, there can be no air-filled spaces in Imagawa – only spaces filled with steam.

Appellant's invention is primarily intended to treat wood and wood products including wood packaging and pallets. These wood products are dried (preferably in a kiln) before being

assembled. Otherwise, after assembly, the individual wood pieces would dry at different rates increasing the probability that the wood pieces would separate. Also, Appellant discloses that its claimed invention can treat machinery, food products, and other staples. By subjecting these products to steam as taught by Imagawa would have a negative effect on the products (machinery will rust, food products would be destroyed or become moldy).

Imagawa is specifically designed to heat-treat fruit. The fruit is not harmed by being subjected to the steam, nor are they degraded when the fruit returns to room temperature and the steam converts to water vapor. Treating wood products, machinery and food products in a system taught by Imagawa, would be futile since the steam would destroy or adversely effect the products being heat-treated. Therefore, Imagawa not only fails to teach or suggest Applicant's structural elements, it fails to attain the advantages of using Applicant's invention.

A system utilizing warm or hot air as a medium for carrying the heat does not have to take into consideration the effects of vaporization, boiling points of liquids, condensation and other factors commonly associated with a heating system that utilizes steam. In fact, a heating system that produces warm air is completely different in structure and operation than a heating system that produces steam. This not only includes the method of producing the medium (furnace for warm air vs. boiler for steam) but how that medium is delivered to the desired location.

Under MPEP 2143.03 all claim limitations must be taught or suggested by the prior art to establish a case of *prima facie* obviousness. MPEP 2143.03 further states that if an independent claim is nonobvious under 35 U.S.C. §103, then any claim depending therefrom is nonobvious.

Imagawa does not disclose or suggest a “steam generator,” does not disclose or suggest a system that utilizes a plenum for directing the heat-carrying medium, and does not disclose or suggest a system that produces “hot air” to kill insects. Accordingly, Imagawa, by itself, cannot make obvious Appellant’s claims 32-34, 26-40, 42-44, 49, 51, and 52.

C. A *prima facie* case of obviousness cannot be established when the primary reference is a “steam” heating system and the secondary references disclose a system for heating or cooling air

1. The Examiner’s rejection of claims 35 and 50 under 35 U.S.C. § 103(a) over Imagawa in view of U.S. Patent No. 6,141,901 to Johnson et al. is based on an improper combination

Imagawa discloses an apparatus for destroying insects using steam. Every embodiment of Imagawa’s insect killing system disclosed in U.S. Pat. No. 4,716,676 utilizes a “steam generator 12.”

U.S. Pat. No. 6,141,901 to Johnson et al. discloses a method of controlling pests by heating outside air and delivers this heated air to an enclosed treatment zone. The treatment zone is either an entire building that has been sealed off, or a room or rooms of a building that have been isolated from the rest of the building. The outside air is heated to a lethal temperature and the air is cycled through the treatment zone in order to maintain a lethal temperature for at least eleven hours which is sufficient for killing insects. The treatment is commenced after determining air penetration parameters for the treatment zone. The temperature in the treatment zone is elevated at a rate of between 5° F and 10° F per hour until the air temperature reaches the lethal level.

There is no suggestion in either Imagawa or Johnson for modifying or adopting an apparatus that produces steam for use with a method that requires warm air. Accordingly, there is no motivation to combine Imagawa with Johnson, and the Examiner's combination is defective on its face.

Moreover, there is no basis for an expectation of success in the prior art. The rejection is not only improper because it fails to provide the required suggestion to modify Imagawa, but also because there is no basis in the prior art for any expectation that such a modification would be successful. In order to satisfy his burden of establishing a prime facie case of obviousness, the Examiner must comply with the following standard:

The consistent criteria for determination of obviousness is whether the prior art would have suggested to one of ordinary skill in the art that this process should be carried out and would have reasonable likelihood of success, viewed in light of the prior art. Both the suggestion and the expectation of success must be founded in the prior art.

In re Dow Chemical, 837 F.2d, 469, 5 U.S.P.Q. 1529, 1531 (Fed. Cir. 1988) emphasis added, citations omitted).

Johnson does not disclose the use of a "steam generator" or the use of steam as the heat-carrying medium. In fact, the use of steam within the building would cause the water vapor to condense within the treatment zone and promote mold and other damage. In Imagawa, the use of steam does not have a detrimental effect on the fruit or vegetables, and is likely advantageous because it washes dirt, fertilizer and pesticide residue from the fruits and vegetables.

As mentioned previously, a system utilizing warm or hot air as a medium for carrying the heat does not have to take into consideration the effects of vaporization, boiling points of liquids, condensation and other factors commonly associated with a heating system that utilizes steam. As set forth in *Audel*, a heating system using warm air is classified separately from a heating system utilizing steam; this not only includes the method of producing the medium (furnace for warm air vs. boiler for steam) but how that medium is delivered to the desired location.

Imagawa and Johnson taken either alone or in combination, simply do not provide the required suggestion or expectation of success. In fact, the combination of Imagawa with Johnson et al. would render Imagawa unsatisfactory for its intended purpose, so there can be no motivation or suggestion to make the proposed combination. Therefore, the Examiner's combination of Imagawa with Johnson et al. is defective on its face and the obviousness rejection of claims 35 and 50 must be reversed. (See MPEP §2143.01.)

2. The Examiner's rejection of claims 41 and 45-47 under 35 U.S.C. § 103(a) over Imagawa in view of either U.S. Patent No. 5,965,185 to Bianco or U.S. Patent No. 6,227,002 to Bianco et al. is based on an improper combination

U.S. Patent No. 5,965,185 to Bianco discloses a transportable and size-adjustable apparatus for accelerating the ripening process of produce. The apparatus includes an air-flow control system for transferring air between a high pressure plenum and a low pressure plenum.

U.S. Patent No. 6,227,002 to Bianco et al. discloses an apparatus for transporting and cooling produce. Both the Bianco and the Bianco et al. patents include a refrigeration unit.

Imagawa discloses a system for producing steam to heat-treat produce, while both Bianco publications disclose refrigeration systems that cool air. Imagawa's system greatly increases the humidity of the chamber to be treated while the inventions disclosed in Bianco and Bianco et al. are designed to reduce the humidity inside the chamber.

Replacing Imagawa's boiler with a refrigeration system disclosed in either of the Bianco's patents would render Imagawa inoperable. Accordingly, the teachings of Imagawa are directly opposite to the teachings of both Bianco patents. Therefore, the Examiner's combination of Imagawa with Johnson is impermissible and the rejection of claims 41 and 45-47 should be reversed.

3. The Examiner's rejection of claim 48 under 35 U.S.C. § 103(a) over Imagawa in view of U.S. Patent No. 3,814,315 to Dmysh is based on an improper combination

U.S. Patent No. 3,814,315 to Dmysh discloses an apparatus for heating air and recirculating the air inside the air inside of a cargo trailer. The apparatus is secured to the exterior surface of the trailer via a curved housing and uses a catalytic heater for heating the air.

Nowhere does Imagawa suggest that a steam generator, and a steam system generally, can be successfully modified by a warm-air system utilizing a catalytic converter. Replacing Imagawa's boiler with Dmysh's heater would render Imagawa inoperable. Imagawa and Dmysh taken either alone or in combination, simply do not provide the required suggestion or expectation of success. In fact, the combination of Imagawa with Johnson et al. would render Imagawa unsatisfactory for its intended purpose, so there can be no motivation or suggestion to make the proposed combination. Therefore, the Examiner's combination of Imagawa with

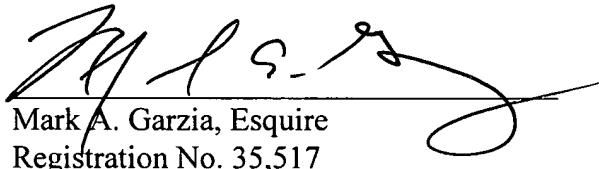
Dmysh is defective on its face and the obviousness rejection of claim 48 must be reversed. (See MPEP §2143.01.)

VIII. Conclusion

The differences between the cited art as a whole and the present invention are substantial, and there is no suggestion or motivation in the art made of record which would lead one of ordinary skill in the art to make an apparatus for killing pests as presently claimed. In fact, the cited art teaches away from the present invention and would discourage a person of ordinary skill from proceeding as Appellant has done. Accordingly, the Examiner's rejections based on Imagawa should be reversed.

Respectfully submitted,
Topp Construction Services, Inc.

Date: 11 SEPT 2006



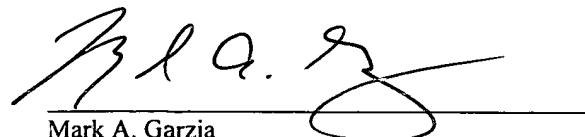
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* * * * *
CERTIFICATE OF MAILING

I hereby certify that this Appeal Brief, along with any paper or fee indicated as being enclosed, is being deposited with the United States Postal Service as First Class Mail, postage prepaid, and addressed to the Mail Stop APPEAL BRIEF – PATENTS, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on September 11, 2006.

Date: 11 SEPT 2006



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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO. : 10/651,583
APPLICANT : TOPP, Daniel P.
TITLE : APPARATUS FOR ERADICATING PESTS
FILING DATE : August 29, 2003
EXAMINER : David J. Parsley
ART UNIT : 3643
ATTORNEY DOCKET NO. : TOPP-P7.1-US
CUSTOMER NO. : 021616

APPELLANT'S APPENDIX A TO APPEAL BRIEF

This listing of claims will replace all prior versions, and listings, of claims in the application.

Claims 1-31 (Canceled).

32. (Previously Presented): An apparatus for eradicating pests, said apparatus comprising:

a chamber having a first end, a second end, a left wall, a right wall, a ceiling, and a floor,

the ceiling and the floor being connected to the ends and walls to define an interior volume of the chamber;

a door that allows ingress to and egress from the interior of the chamber, said door positioned at the first end of the chamber;

a means for heating air in the interior volume of said chamber, said heating means capable of heating said air in said chamber to at least a temperature lethal to pests;

a plenum that communicates with said heating means and said air in the interior volume of said chamber for delivering heated air from the heating means to said interior volume of the chamber, said plenum being formed either internal or external to the chamber;

a means for circulating air in the chamber, said plenum cooperating with said air circulating means for more evenly distributing the air within the interior volume of said chamber; and

a means for returning air from the interior volume of the chamber to said heating means to be heated by the heating means in order to heat-treat any products placed within the chamber to a temperature that is lethal to pests.

33. (Previously Presented) The apparatus of claim 36 wherein said means for returning air comprises a second plenum, said plenum and said second plenum cooperating with each other and with said fan to more evenly circulate the air within the interior of said chamber.

34. (Previously Presented): The apparatus of claim 32 wherein said heater comprises an indirect-fired heating unit.

35. (Previously Presented): The apparatus of claim 32 wherein said heater comprises a direct-fired heating unit.

36. (Previously Presented): The apparatus of claim 32 wherein said means for circulating air comprises a fan assembly utilizing a fan and electric fan motor.

37. (Previously Presented): The apparatus of claim 33 wherein said fan assembly is a duct axial fan.

38. (Previously Presented): The apparatus of claim 33 wherein said floor is reinforced to support the weight of any machinery required to load objects into or unload objects from said chamber.

39. (Previously Presented): The apparatus of claim 33 wherein said heater has an inlet for allowing the second plenum to communicate with the heater thereby directing air into said heater and an output for allowing the plenum to communicate with the heater thereby directing heated air into the interior volume of the chamber to heat said interior volume.

40. (Previously Presented): The apparatus of claim 39 wherein said heater output and input are connected to said plenum and to said second plenum respectively via ducting.

41. (Previously Presented): The apparatus of claim 33 wherein said chamber is a modified trailer having towing means and a tractor wheel assembly attached to the underside of said chamber for facilitating the movement and transportation of said chamber.

42. (Previously Presented): The apparatus of claim 32 further comprising a sub-ceiling wherein said sub-ceiling along with the existing ceiling forms said plenum internal to the chamber.

43. (Previously Presented): The apparatus of claim 42 wherein said means for heating comprises an inlet for allowing outside air to be heated for make-up air as required to pressurize the interior of the chamber.

44. (Previously Presented): An apparatus for eradicating pests that utilizes warm air, said apparatus comprising:

a chamber defining an interior volume, said chamber having means for lifting by external machinery, said chamber having first and second ends;

a door or doors that allows ingress and egress from the interior of the chamber, said doors positioned at the first end of the chamber;

a means for heating air, the air heating means being capable of raising the temperature of the interior of said chamber to a temperature that is lethal to pests, and

a plenum that communicates with said means for heating for assisting in distributing air more evenly throughout the interior volume of said chamber, said plenum and said means for heating being located either exterior to or remotely from said chamber.

45. (Previously Presented): The apparatus of claim 44 wherein said chamber is a refurbished insulated commercial trailer commonly referred to as a reefer box.

46. (Previously Presented): The apparatus of claim 44 further comprising a plurality of wheels that can be mounted on the underside of said chamber in order to move the chamber and facilitate its portability.

47. (Previously Presented): The apparatus of claim 44 further comprising a trailer having wheels, said trailer adapted to be pulled by a tractor truck and that can accept said chamber in order to move the chamber and facilitate its portability.

48. (Previously Presented): The apparatus of claim 44 wherein said chamber is comprised of a modified existing trailer to which said heating device is attached.

49. (Previously Presented): An apparatus for eradicating pests, said apparatus comprising:

a chamber having a first end, a second end, a left wall, a right wall, a ceiling, a sub-ceiling, and a floor, the ceiling and sub-ceiling defining a ceiling plenum;

a door that allows ingress to and egress from the interior of the chamber, said door positioned at one end or each end of the chamber;

a heater having the capacity to heat the air in the interior of said chamber to a desired temperature for a desired period of time, said desired temperature being of sufficient temperature and said desired period of time being of sufficient period so as to be lethal to pests;

the heater having an inlet and an outlet, the outlet of said heater connected directly to said chamber;

means for circulating air having an inlet and an outlet, the outlet of said circulating air means connected to the inlet of said heater, and the inlet of said circulating air means connected to said ceiling plenum, said ceiling plenum communicating with the interior of the chamber to define a continuous volume for allowing air to be moved by the circulating means through the heater, into the interior of the chamber, through the ceiling plenum and back to the circulating means, said means for circulating, said heating means and said ceiling plenum communicating with each other in order to more evenly heat the interior of said chamber.

50. (Previously Presented): The apparatus of claim 49 wherein said heater and means for circulating are housed in the same unit such as a direct-fired heater.

51. (Previously Presented): The apparatus of claim 49 further comprising a control means for controlling the operation of said heater and said air circulating means so that when a desired temperature and time period are entered into the control means the heater and air circulating means working together draw air from the chamber into said ceiling plenum and

eventually into said air circulating means, said drawn air is then pushed into said heater where it is heated to a predetermined temperature, the heated air then being directed into the floor plenum through the perforated floor and into the chamber, said control means ensuring that the air circulating means and heater operate at least intermittently for the desired period of time in order to keep the air within said chamber and any products placed within the chamber at the desired temperature.

52. (Previously Presented): The apparatus of claim 49 further comprising a primary floor spaced apart from and above the floor of said chamber in order to define a floor plenum, the primary floor comprising a plurality of sections having perforations, said perforations being sized, shaped and spaced in order to communicate with said means for circulating, said heating means and said ceiling plenum to further improve and distribute heat evenly within the interior of said chamber.

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APPLICANT	:	TOPP, Daniel P.
TITLE	:	APPARATUS FOR ERADICATING PESTS
FILING DATE	:	August 29, 2003
EXAMINER	:	David J. Parsley
ART UNIT	:	3643
ATTORNEY DOCKET NO.	:	TOPP-P7.1-US
CUSTOMER NO.	:	021616

APPELLANT'S APPENDIX B TO APPEAL BRIEF

(Declaration Under 37 CFR §1.132 of Jeffrey S. Helmes)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT	:	Daniel P. Topp
TITLE	:	APPARATUS FOR ERADICATING PESTS
APPLN. NO.	:	10/651,583
FILING DATE	:	August 29, 2003
EXAMINER	:	David J. Parsley
ART UNIT	:	3643
ATTORNEY DOCKET NO.	:	TOPP-P7.1-US

TO: Mail Stop - AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

DECLARATION UNDER CFR § 1.132 OF JEFFREY S. HELMES

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Dear Sirs:

I, Jeffrey S. Helmes, hereby declare that:

(A.) I graduated in 1992 from Drexel University (Philadelphia, PA) with a Bachelors of Science degree in Mechanical Engineering. I have been working continuously since 1992 in the mechanical engineering field and since 1996 in the field of HVAC (heating, ventilation & air conditioning). I am currently employed full-time as a Senior Project Engineer at Maguire Products, Inc. in Aston, PA.

(B.) I have studied and am familiar with the above-identified application, the Office Action dated October 13, 2004, and Patent No. 4,716,676 to Imagawa (hereinafter referred to as "Imagawa"). The Examiner alleges that Imagawa teaches the use of plenums and specifically that Imagawa discloses a ceiling and sub-ceiling that forms a plenum. Based on the Examiner's interpretation of Imagawa, he alleges that such features anticipate Applicant's invention.

(C.) Based on my experience in the HVAC (heating, ventilation and air conditioning) industry, it is my opinion that Imagawa does not disclose a plenum as used in the HVAC industry and, in fact, I am unable to discern what the Examiner is calling a sub-ceiling. The Examiner makes broad statements regarding the Figures of Imagawa but does not support his broad statements by referring to specific elements. As an example of the Examiner's lack of locating elements, in Paragraph 4 of the Office Action the Examiner writes "Imagawa discloses an apparatus for eradicating pests comprising, a chamber having a first end, a second end, a left wall, a right wall, a ceiling, sub-ceiling, and a floor – see for example Figure 2 and 6-7, the ceiling and sub-ceiling forming a plenum."

(D.) As will be discussed in the following paragraphs, it is my opinion that:

- a) Imagawa does not disclose either a ceiling plenum or a floor plenum;
- b) Imagawa discloses the use of hoods; and
- c) The teachings of Imagawa regarding the heating of items inside the chamber are contrary to the teachings of the present invention.

(E.) My opinion that Imagawa does not disclose a plenum as the term is used in the HVAC industry is based on a number of factors. First, if Imagawa intends to utilize a plenum, it would have been a simple matter of using the term "plenum." Instead, Imagawa did not use the term plenum anywhere in the specification. Second, the Examiner's description of a "plenum"

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as an air-filled space (see paragraph 6 of the Office Action dated October 13, 2004) is overly simplistic and is not the definition of which I am familiar as used in the HVAC industry.

The term “plenum” is well known in the HVAC industry. A “plenum,” as used in the HVAC industry, is an enclosed portion of a ventilation system that delivers or receives air from a blower for distribution in a ventilation system. Preferably, a plenum is limited to uninhabited crawl spaces. See *Uniform Mechanical Code 2000*, Sections 601 and 602; and *1998 International Mechanical Code* Sections 602 and 1304.

I cannot find a plenum, as the term is commonly used in the HVAC industry, anywhere in Imagawa. If the Examiner had pointed out specifically with reference numerals what features he believes form a plenum in Imagawa, I could be able to directly dispute the Examiner’s interpretation.

(F.) As shown in Figures 1 and 3, Imagawa clearly utilizes a plurality of horizontally positioned hoods 10, 11. Each hood has a blower (10a, 10b, 10c, 11a, 11b, 11c, etc.) associated with it. In addition, Imagawa utilizes a plurality of “insect killing cells B” that include fruit stored in harvest boxes, impenetrable cover members 23, and vertically positioned hoods 21. Each vertically positioned hood 21 includes a differential fan 22 that force steam through the fruit and the harvest boxes. The hoods 21 are connected to a “winding means” 26, 27 that has its own support structures that are permanently affixed inside the chamber but are not labeled. Each insect killing cell B is designed to move over roller conveyors 16 at the bottom of the chamber.

A “duct system” may include ducts, plenums, fans, and accessory air-handling equipment. However, a “plenum” does not include fans, blowers, etc. Accordingly, the hoods 21 and associated fans 22 do not form a plenum and there are no other features in Imagawa that I would consider a “plenum.” For example, in Figure 7, a separate inner chamber is permanently

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attached inside of the outer chamber A'. The inner chamber has a plurality of ventilation holes in its top and bottom, but there are no plenums as used in the HVAC industry.

(G.) Imagawa expressly states that its system is designed to deliver steam on a large scale to raw fruit. Further, the raw fruit is stacked in neat vertical columns so that each stack can be fitted with a hood.

Even using the Examiner's definition of plenum as an "air-filled space" would not be accurate in describing any volume illustrated in Imagawa since the spaces in Imagawa are filled with steam not air.

In order to prevent condensation of the steam and to meet various building codes, special passages are required. Imagawa requires the use of fitted hoods 21, with special fans 22, and flexible, impenetrable fabric 23. The impenetrable fabric 23 must be flexible so that the differential fan 22 can pull the fabric 23 close to the harvest boxes. (See Imagawa at Column 3, lines 43-54.)

The subject application uses a plenum to ensure that heated air is spread evenly over various items in order to be heat-treated. There are few similarities between a system that delivers steam and one that delivers heated air. To the best of my knowledge, no HVAC plenum is designed to deliver steam. For this reason alone, Imagawa does not disclose a plenum, and its teachings are contrary to the teachings of the subject application.

(H.) I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Respectfully submitted,

Date: 1/11/05



Jeffrey S. Helmes
Senior Project Engineer